

STATE OFFICE OF ADMINISTRATIVE HEARINGS



SEP 09 2007

Ho

DATE

September 10, 2007

NUMBER OF PAGES INCLUDING THIS COVER SHEET

7

SOAH DOCKET NO.

458-07-2672

TABC vs. Del Rio Entertainment d/b/a Club Arriba

FROM

Celia Rodriguez

| FAX TO: | FAX NO.: |
|---------------------------|----------------|
| JEANNENE FOX, TABC | (512) 206-3350 |
| MARK D. THREADGILL, ATTY. | (432) 362-9456 |
| SANDRA K. PATTON, TABC | (713) 426-7965 |

MESSAGE.

Proposal for Decision on the above referenced case.

El Paso State Office Building
401 East Franklin Ave., Suite 580 ♦ El Paso, Texas 79901
(915) 834-5650 ♦ (915) 834-5657 Fax

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone so that we can make arrangements for return of the original message to us. Thank you.

SEP 09 200

SOAH DOCKET NO. 458-07-2672

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION.**

Petitioner

V

DEL RIO ENTERTAINMENT L.L.C.
d/b/a CLUB ARRIBA
LICENSE NOS. MB-472987 & LB-472988
Respondent

EL PASO COUNTY, TEXAS
(TABC CASE NO. 537182)

[illegible]

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Petitioner) brought this enforcement action against Del Rio Entertainment C d/b/a Club Arriba (Respondent) alleging that Respondent permitted persons to take alcoholic beverage purchased on the licensed premises from the premises where sold. The Administrative Law Judge (ALJ) finds the allegations to be true and recommends a suspension of Respondent's permit and license for a period of six days, and that the Respondent be allowed to pay \$900.00¹ civil penalty, in lieu of suspension.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested issues in this proceeding. Therefore, those matters are addressed only in the Findings of Fact and Conclusions of Law.

On July 10, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901. The Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Mark Threadgill. The hearing reconvened

The penalty for the suspension is at \$150.00 per day

on July 3, 2007 for testimony from a witness telephonically. The record closed on July 13, 2007.

II. APPLICABLE LAW

The applicable law sets forth that TABC may suspend for not more than 60 days or cancel an original or renewal retail dealer's license if it is found, after notice and hearing, that the permittee violated a provision of the Code.² The provision which is alleged to have been violated is § 28.10(b) which prohibits a permittee from permitting any person to take any alcoholic beverage purchased on the licensed premises from the premises where sold.³

III. EVIDENCE

Club Arriba is located in Del Rio, Texas. On June 9, 2006, the club was hosting an event featuring a band known as "Los Palominos. There were in excess of 100 people in attendance. About 11:30 p.m., TABC agent Matthew West, accompanied by a civilian rider, who was a correctional officer, Juan Torres, arrived to conduct a routine inspection. Present at the club that evening were Mike McDonald, customer service representative, and Reynaldo "Rey" Gutierrez, general manager.

A. Petitioner's Case

Petitioner proffered two exhibits: custodian of record affidavit, copy of license and "greer card" No. 7006 0810 0000 2143 0017 (Exhibit No.1); ABC-San Antonio incident report (Exhibit No. 2). All documents were admitted into evidence. TABC agent Matthew West testified. On July

² TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2) [Cancellation or Suspension of Permit].

TEX. ALCO. BEV. CODE ANN. § 28.10(b) [Consumption Restricted to Premises; Exceptions]

³ The voluntary statement of Juan Torres, which was part of the San Antonio incident report, Exhibit No. 2, was not admitted into evidence on June 10, 2007. It was not proffered on July 13, 2007, when the witness testified.

SOAH DOCKET NO. 458-07-2672

PROPOSAL FOR DECISION

PAGE 3

Juan Torres testified telephonically:

Agent West testified that in the course of conducting a routine inspection of Club Arriba on June 9, 2006, he observed three people, two men and one woman, exit the back door of the establishment carrying beer. This was observed within minutes of his arrival. He testified that the door was open, which was the detail that caught his attention. Upon observing these individuals exit the club, he proceeded to the back door. He observed the two men board the band's bus which was parked in the alley way. The woman, the spouse of one of the band members, was standing outside holding a Miller Lite beer. She was highly intoxicated and was arrested for public intoxication. Agent West stated that the woman admitted to taking the beer outside. Agent West testified that he did not meet with the general manager until the woman was arrested and transported, for processing.

Juan Torres also testified that the manager was at the club, but he did not approach them when they first arrived. He observed two males carrying alcohol walk out the back door which was open. He said there were no security personnel at the back door.

B. Respondent's Case

Respondent did not proffer any written evidence. Respondent called Mike McDonald and Rey Gutierrez to testify.

Mike McDonald was in charge of security as part of his customer service duties on the date at issue. He testified that he stood in front of the back exit door all night allowing only the band members to enter and exit. He said that the back door was closed continuously.

Rey Gutierrez testified that he met agent West outside the front door upon his arrival and he accompanied him during the entire time of the inspection.

IV. ANALYSIS

The testimony is contradictory. Nonetheless, the fact that there were people exiting the back door was corroborated by agent West and by the correctional officer, Juan Torres. Both of them observed people carrying alcohol as they exited. The fact that the back door was open was also corroborated by Juan Torres. Mike McDonald's assertion that he was at the back door all night, that the door was closed, and that he did not allow anyone to enter or exit is not credible. Furthermore, Rey Gutierrez' assertion that he accompanied the agent throughout the visit is also not credible. Both agent West and Juan Torres testified that they made contact with Rey Gutierrez after the woman had been transported. It is clear that agent West and Juan Torres proceeded to the rear of the club more than once.

The facts support a conclusion that Respondent permitted people to exit the back door of the establishment carrying Miller Lite beers. The woman admitted that the beer was purchased on the licensed premises. Miller Lite was a sponsor of the event.

The TABC has prayed for a 10 day suspension, or a \$1,500.00 civil penalty. The ALJ recommends a six day suspension, or a \$900.00 civil penalty, based on the following factors:

Respondent is not a repeat violator. Agent West testified that he performed routine inspections for a period of two years and found no violations;

The violation is not a major regulatory nor a health, safety and welfare violation; and

The allegation comprises one violation.

V. FINDINGS OF FACT

Del Rio Entertainment L.L.C. d/b/a Club Arriba holds a Mixed Beverage Permit MB-472987 and a Mixed Beverage Late Hour Permit LB-472988, issued by the TABC for the premises known as Club Arriba, located at 2400 Veterans Boulevard, Suite 23, Del Rio, Val Verde County, Texas.

SOAH DOCKET NO. 458-07-2672

PROPOSAL FOR DECISION

PAGE 5

- 2 The permits were issued on June 2, 2000, and have been continuously renewed

On May 3, 2007, TABC issued its notice of hearing directed to Respondent at the mailing address provided by Respondent via certified mail No. 7006 0810 0000 2143 0017.

The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

On May 24, 2007, the parties filed an Agreed Motion to Transfer Venue which was granted on May 29, 2007, transferring venue to El Paso, Texas for the convenience of the party representatives and witnesses.

- 6 On July 10, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901.

The Texas Alcoholic Beverage Commission was represented at the hearing by Sandra Patton, TABC Staff Attorney.

- 8 Respondent was represented by Mark Threadgill, attorney at law

On June 9, 2006, Club Arriba was hosting an event featuring a band known as Los Palominos. There were in excess of 100 people in attendance.

- 10 Present at Club Arriba on June 9, 2006, were Mike McDonald, customer service representative and Reynaldo "Rey" Gutierrez, general manager.

At about 30 p.m. on June 9, 2006, two men and one woman exited the club via the back door.

The two men and one woman were carrying Miller Lite beers as they exited the club.

- 13 The two men boarded the band's bus which was parked in the alley way.

- 14 The woman stood outside, holding a Miller Lite beer.

The woman was highly intoxicated and was arrested for public intoxication.

- 16 The woman admitted that she took the beer from the club to the alley

There was no security personnel at the back door

- 18 The back door of Club Arriba was not closed continuously
- 19 Respondent does not have any prior Texas Alcoholic Beverage Code violations.

VI. CONCLUSIONS OF LAW

The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.

- 2 The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.

Proper and timely notice of the hearing was effected on all parties pursuant to 1 TEX. ADMIN CODE (TAC) §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN § 11.63

- 4 On June 9, 2006, Respondent permitted three persons to take alcoholic beverages purchased on the licensed premises from the premises as they exited the back door at Club Arriba, in violation of TEX. ALCO. BEV. CODE ANN. § 28.10(b).

Respondent's permits should be suspended for six days, or Respondent should be allowed to pay \$900.00 in lieu of suspension.

SIGNED September 10, 2007


VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS